

§ 1908.7

29 CFR Ch. XVII (7-1-99 Edition)

take the necessary action, the consultant must immediately notify the affected employees and the appropriate OSHA enforcement authority and provide the relevant information.

(2) An employer must also take the necessary action in accordance with the plan developed under § 1908.6(e)(7) to eliminate or control employee exposure to any identified serious hazard. In order to demonstrate that the necessary action is being taken, an employer may be required to submit periodic reports, permit a followup visit, or take similar action.

(3) An employer may request, and the consultation manager may grant, an extension of the time frame established for correction of a serious hazard when the employer demonstrates having made a good faith effort to correct the hazard within the established time frame; shows evidence that correction has not been completed because of factors beyond the employer's reasonable control; and shows evidence that the employer is taking all available interim steps to safeguard the employees against the hazard during the correction period.

(4) If the employer fails to take the action necessary to correct a serious hazard within the established time frame or any extensions thereof, the consultation manager shall immediately notify the appropriate OSHA enforcement authority and provide the relevant information. The OSHA enforcement authority will make a determination, based on a review of the facts, whether enforcement activity is warranted.

(5) After correction of all serious hazards, the employer shall notify the consultation manager by written confirmation of the correction of the hazards, unless correction of the serious hazards is verified by direct observation by the consultant.

(g) *Written report.* A written report shall be prepared for each visit which results in substantive findings or recommendations, and shall be sent to the employer. The timing and format of the report shall be approved by the Assistant Secretary. The report shall restate the employer's request and describe the working conditions examined by the consultant; shall, within

the scope of the request, evaluate the employer's program for ensuring safe and healthful employment and provide recommendations for making such programs effective; shall identify specific hazards and describe their nature, including reference to applicable standards or codes; shall identify the seriousness of the hazards; and, to the extent possible, shall include suggested means or approaches to their correction. Additional sources of assistance shall also be indicated, if known, including the possible need to procure specific engineering consultation, medical advice and assistance, and other appropriate items. The report shall also include reference to the completion dates for the situations described in § 1908.6(f) (1) and (2).

(h) *Confidentiality.* The consultant shall preserve the confidentiality of information obtained as the result of a consultative visit which contains or might reveal a trade secret of the employer.

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[49 FR 25094, June 19, 1984, as amended at 54 FR 24333, June 7, 1989]

§ 1908.7 Relationship to enforcement.

(a) *Independence.* (1) Consultative activity by a State shall be conducted independently of any OSHA enforcement activity.

(2) The consultative activity shall have its own identifiable managerial staff. In States with Plans approved under section 18 of the Act, this staff will be separate from the managing of compliance inspections and scheduling.

(3) The identity of employers requesting onsite consultation, as well as the file of the consultant's visit, shall not be forwarded or provided to OSHA for use in any compliance inspection or scheduling activity, except as provided for in § 1908.6(f) (1) and (4) and § 1908.7(b)(4).

(b) *Effect upon scheduling.* (1) An onsite consultative visit already in progress will have priority over OSHA compliance inspections except as provided in § 1908.7(b)(2). The consultant and the employer shall notify the compliance officer of the visit in progress and request delay of the inspection until after the visit is completed. An

onsite consultative visit shall be considered in progress in relation to the working conditions, hazards, or situations covered by the request from the beginning of the opening conference through the end of the closing conference; except that for periods which exceed 30 days from the initiation of the opening conference, the RA may determine that the inspection will proceed. For working conditions, hazards, or situations not covered by the request, the onsite consultative visit shall be considered in progress only while the consultant is at the place of employment.

(2) The consultant shall terminate an onsite consultative visit already in progress where one of the following kinds of OSHA compliance inspections is about to take place:

- (i) Imminent danger investigations;
- (ii) Fatality/catastrophe investigations;
- (iii) Complaint investigations;
- (iv) Other critical inspections as determined by the Assistant Secretary.

(3) An onsite consultation visit may not take place while an OSHA enforcement inspection is in progress at the establishment. An enforcement inspection shall be deemed "in progress" from the time a compliance officer initially seeks entry to the workplace to the end of the closing conference. An enforcement inspection will also be considered "in progress" in cases where entry is refused, until such times as: the inspection is conducted; the RA determines that a warrant to require entry to the workplace will not be sought; or the RA determines that allowing a consultative visit to proceed is in the best interest of employee safety and health. An onsite consultative visit shall not take place subsequent to an OSHA enforcement inspection until a determination has been made that no citation will be issued, or if a citation is issued, onsite consultation shall only take place with regard to those citation items which have become final orders.

(4) When an employer requests and undergoes a consultative visit at an establishment covering all conditions and operations in the place of employment related to occupational safety and health; corrects all hazards that

have been identified during the course of the consultative visit within established time frames, and posts notice of their correction when such is completed; demonstrates to the consultant that certain core elements of an effective safety and health program are in effect, and that the remaining elements of an effective safety and health program will be implemented within a reasonable, established time frame; and agrees to request a consultative visit if major changes in working conditions or work processes occur which may introduce new hazards, the employer may, upon request, be exempt from a general schedule OSHA enforcement inspection for a period of one year from the end of the closing conference of the consultative visit. Between the time of election to participate in the process required to qualify for the exemption and the completion of the process, the employer must post a notice of such participation.

(5) When an employer requests consideration for an inspection exemption under §1908.7(b)(4), the provisions of §1908.6 (e)(7), (f)(3) and (f)(5) shall apply to other-than-serious hazards as well as serious hazards.

(c) *Effect upon enforcement.* (1) The advice of the consultant and the consultant's written report will not be binding on a compliance officer in a subsequent enforcement inspection. In a subsequent inspection, a compliance officer is not precluded from finding hazardous conditions, or violations of standards, rules or regulations, for which citations would be issued and penalties proposed.

(2) The hazard identification and correction assistance given by a State consultant, or the failure of a consultant to point out a specific hazard, or other possible errors or omissions by the consultant, shall not be binding upon a compliance officer and need not affect the regular conduct of a compliance inspection or preclude the finding of alleged violations and the issuance of citations, or constitute a defense to any enforcement action.

(3) In the event of a subsequent inspection, the employer is not required to inform the compliance officer of the prior visit. The employer is not required to provide a copy of the State

consultant's written report to the compliance officer, except to the extent that disclosure of information contained in such a written report is required by 29 CFR 1910.20.

(4) If, however, the employer chooses to provide a copy of the consultant's report to a compliance officer, it may be used as a factor in determining the extent to which an inspection is required and as a factor in determining proposed penalties. When, during the course of a compliance inspection, an OSHA compliance officer identifies the existence of serious hazards previously identified as a result of a consultative visit, the Area Director shall have authority to assess minimum penalties if the employer is in good faith complying with the recommendations of a consultant after such consultative visit.

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[49 FR 25094, June 19, 1984, as amended at 54 FR 24333, June 7, 1989]

§ 1908.8 Consultant specifications.

(a) *Number.* (1) The number of consultant positions which will be funded under a Cooperative Agreement pursuant to this part for the purpose of providing consultation to private sector employers will be determined by the Assistant Secretary on the basis of program performance, demand for services, industrial mix, resources available, and the recommendation of the RA, and may be adjusted periodically.

(2) States shall make efforts to utilize consultants with the safety and health expertise necessary to properly meet the demand for consultation by the various industries within a State. The RA will determine and negotiate a reasonable balance with the State on an annual basis.

(b) *Qualifications.* (1) All consultants utilized under Cooperative Agreements pursuant to this part shall be employees of the State, qualified under State requirements for employment in occupational safety and health. They must demonstrate adequate education and experience to satisfy the RA before assignment to work under an Agreement, and annually thereafter, that they meet the requirements set out in § 1908.8(b)(2), and that they have the

ability to perform satisfactorily pursuant to the Cooperative Agreement. Persons who have the potential but do not yet demonstrate adequate education and experience to satisfy the RA that they have the ability to perform consultant duties independently may, with RA approval, be trained under a Cooperative Agreement to perform consultant duties. Such persons may not, however, perform consultant duties independently until it has been determined by the RA that they meet the requirements and have the ability indicated. All consultants shall be selected in accordance with the provisions of Executive Order 11246 of September 24, 1965, as amended, entitled "Equal Employment Opportunity."

(2) Minimum requirements of consultants shall include the following:

(i) The ability to identify hazards; the ability to assess employee exposure and risk; knowledge of OSHA standards; knowledge of hazard correction techniques and practices; knowledge of workplace safety and health program requirements; and the ability to effectively communicate, both orally and in writing.

(ii) Consultants shall meet any additional degree and/or experience requirements as may be established by the Assistant Secretary.

(c) *Training.* As necessary, the Assistant Secretary will specify immediate and continuing training requirements for consultants. Expenses for training which is required by the Assistant Secretary or approved by the RA will be reimbursed in full.

§ 1908.9 Monitoring and evaluation.

(a) *Assistant Secretary responsibility.* A State's performance under a Cooperative Agreement will be regularly monitored and evaluated by the Assistant Secretary as part of a systematic Federal plan for this activity. The Assistant Secretary may require changes as a result of these evaluations to foster conformance with consultation policy. If the State policies or practices which require change are such that the State's assurance of correction of serious hazards and of the effectiveness of employers' safety and health programs is in doubt, the Assistant Secretary may, pending the completion of the